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IN THE

Supreme Court of the United States

October Term, 1953

No. 772

LAKE ONTARIO LAND DEVELOPMENT AND BEACH PROTECTION ASSOCIATION, INC. (Also Known as Lake Ontario Land Owners and Beach Protective Association, Inc.), *Petitioner.*

vs.

FEDERAL POWER COMMISSION, *Respondent*

and

GREAT LAKES-ST. LAWRENCE ASSOCIATION, POWER AUTHORITY OF THE STATE OF NEW YORK, *Intervenors.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT WITH SUPPORTING BRIEF

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To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States.

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Ap-

peals for the District of Columbia Circuit entered in the above cause on January 29, 1954 (R. 436).

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth on pages 422 to 434 inclusive of the record. Said opinion has not been otherwise published.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on January 29, 1954 (R. 436). The jurisdiction of this Court is invoked under Section 1254 (I), 28 U.S.C. of the Judicial Code.

QUESTION PRESENTED

Whether the Petitioner has been deprived of his constitutional rights in that the order of the Federal Power Commission, granting a license to the Power Authority of the State of New York, takes the Petitioner's property without just compensation in violation of the Fifth Amendment of the United States Constitution.

STATUTES AND REGULATIONS INVOLVED

The pertinent sections of the Constitution of the United States, the Boundary Waters Treaty of 1909 and the Statutes are hereinafter discussed in the argument, and are set out in the appendix to this argument and brief.

STATEMENT OF THE CASE

Petitioner is an association composed of approximately 1500 members whose properties border on Lake Ontario. The properties in most cases include the members' homes. Petitioner is incorporated under the laws of the State of New York as a non-profit association for the purpose of protecting its members from man-made high water in Lake Ontario.

The Power Authority of the State of New York, on September 22, 1952, filed an amended application with the Federal Power Commission seeking authority to construct and operate a proposed hydro-electric project jointly with the Ontario Hydro-Electric Commission of Ontario, Canada, a governmental agency created by the Province of Ontario. The project is to be located in the International Rapids Section of the St. Lawrence River, extending from the United States shore to the Canadian shore of the river.

On October 29, 1952, the International Joint Commission signed an order, approving the applications filed June 30, 1952 by the Governments of the United States and Canada "(A. 357)".

Petitioner was permitted to intervene in the proceeding before the Respondent known as Project No. 2000 on November 13, 1952 "(A. 99)".

Petitioner appeared by Counsel "(A. 273)", cross-examined witnesses "(A. 274-278; 283-285)", filed a brief and participated in oral argument before the presiding examiner, and filed exceptions to the decision, findings and order of the presiding examiner with the Federal Power Commission.

The Commission issued an "Opinion and Order" on July 15, 1953, granting in substance the license requested by the Power Authority of the State of New York "(A. 192)". Petitioner thereupon filed a petition for rehearing on August 14, 1953 "(A. 249)" together with a motion for leave to adduce additional evidence both of which the Commission denied in an order issued on September 4, 1953.

On October 30, 1953, Petitioner filed a petition for review of Respondent's "Opinion and Order" with the United States Court of Appeals for the District of Columbia Circuit "(A. 2)" and in the prayer for relief requested that the findings and conclusions therein contained be modified in accordance with the proper judicial construction of the Constitution of the United States. On January 29, 1954, the United States Court of Appeals for the District of

Columbia Circuit entered a judgment and decree affirming the order of the Respondent. On February 12, 1954, Petitioner filed a petition for rehearing en banc with the United States Court of Appeals for the District of Columbia Circuit. This petition was denied by an order of the United States Court of Appeals for the District of Columbia Circuit on February 18, 1954.

Water levels in Lake Ontario in excess of 247 feet are gravely injurious to the lands and homes of the members of the Association "(A. 273, 274)"; there is a direct relationship between the levels which will be created up stream of the Iroquois Dam by the construction and operation of the dam and the levels of Lake Ontario "(A. 283, 284)". The applicant proposes and Respondent has permitted the use of "Method of Regulation No. 5" for the control of the levels of water upstream of the Iroquois Dam "(A. 283)". With the use of this Method, applicant will create levels of water upstream of the Iroquois Dam which will in turn create levels of water in Lake Ontario in excess of 247 feet and up to 249.10 feet on occasions. "(A. 283, 284)".

One of the requirements of Method of Regulation No. 5 states in effect that the natural level of Lake Ontario will be the artificial level realized in the past under the impeding effect of Gut Dam "(A. 379)".

The Power Authority of the State of New York takes no position as to the proper natural levels of Lake Ontario "(A. 275)" or at least concedes that the estimates it had been using and which had been prepared by the Special Projects Branch, Department of Transport, Government of Canada did not take into account the impeding effect of the Gut Dam located in the International Rapids Section of the St. Lawrence River by Canada or the additional water discharged into the Great Lakes system by the Canadian diversion of the natural flow of the Long Lac and Ogoki Rivers or the diversions from the Great Lakes system by the Chicago Drainage Canal "(A. 284, 285)".

The Power Authority of the State of New York has made no study as to the possible damage to lands on the southern shore of Lake Ontario which might result from the project and does not know of any study made by anyone. The applicant made no estimate of the costs of condemnation or compensation for damages to lands or homes adjoining Lake Ontario "(A. 275, 276)". The Power Authority of the State of New York takes the position that even the payment of $100,000,000 damages to the land owners around Lake Ontario would not impair the economic desirability of the project (R. 297).

REASONS FOR GRANTING THE WRIT

Petitioner asserts that a writ of certiorari should be granted in this case because of the large number of American citizens whose properties will be taken by the license in question and because of the broad implication of the lower Court's refusal to consider the effect of Article 19 of the license in domesticating and incorporating the applicable provisions of an order of an international tribunal when in effect it takes the property of Petitioner without just compensation, as required by the Fifth Amendment to the United States Constitution. A substantial and novel question is involved: Whether any immunity from review by United States courts, that may be enjoyed by international tribunals, is lost when the order of such tribunal in question requires incorporation in an order of a United States agency to be effective and when the order of such tribunal jeopardizes property rights guaranteed by the United States Constitution.

ARGUMENT AND BRIEF

The license under review violates the Fifth Amendment to the Constitution of the United States by taking the property of members of Petitioner without just compensation.

The license domesticates and incorporates the order of the International Joint Commission as follows:

> "Article 19. In the design, construction, maintenance and operation of the project covered by this license, the Licensee shall comply with all applicable provisions and requirements of the Order of Approval (International Joint Commission Docket 68) issued October 29, 1952, by the International Joint Commission to the Governments of the United States and Canada for the construction of certain works for the development of power in the International Rapids Section of the St. Lawrence River." "(A. 214)"

Without Article 19 of the license there is no privity between the Power Authority of the State of New York and the International Joint Commission since the United States and not the Power Authority of the State of New York was the applicant before the International Joint Commission. Until the "applicable provisions and requirements * * *" were made effective in Article 19, they did not hurt Petitioner. Article 19 takes without any compensation or any remedy the properties of Petitioner's members in the following manner: One of the "applicable provisions and requirements * * *" incorporated in the license is Method of Regulation No. 5. "(A. 363)" Requirement (a) of this Method authorizes and directs the setting of the water level of Lake Ontario in the following words:

> "(a) To keep the fluctuation of the levels of Lake Ontario within the levels that would have resulted in the past, assuming a continuous diversion of 3200 c.f.s. at Chicago in present outlet conditions."

On October 29, 1952, when Method of Regulation No. 5 was included in the order of the International Joint Commission, the Gut Dam, constructed by Canada, was and had been for a number of years in the St. Lawrence River and had impeded the flow of waters, thereby raising the natural levels of Lake Ontario. This impeding effect is the reason why the International Joint Commission ordered the removal of Gut Dam "(A. 365)" and the reason why the date of removal was stated as follows:

"* * * as soon as river conditions and the protection of down river and other interests that will be affected during its removal will permit, thereby advancing the time of removal of Gut Dam; * * *" "A. 359)"

Plate No. 9 (R. 417 A), which is part of the engineering date on which Method of Regulation No. 5, forming part of the order, is based, indicates that Gut Dam raised the natural levels at Oswego (Lake Ontario) from nine to eleven inches during high water. The "applicable provisions and requirements * * *" of Article 19 gives effect to the order of the International Joint Commission and wrongfully authorizes and directs levels for Lake Ontario, which had been artificially raised by Gut Dam, in continuing the levels of the past instead of decreeing natural levels. In so doing, the Respondent gives to the Power Authority of the State of New York and Canada the amount of properties belonging to the members of Petitioner which will be appropriated by the nine to eleven inches of flooding, shown in Plate No. 9 (R. 417A). Because of the low lying character of many of the properties, this amounts to the total taking of the properties of a substantial number of Petitioner's members at high water and the taking of a material portion of the properties of others. The worth of the properties thus taken runs into millions of dollars (R. 419).

Method of Regulation No. 5 states as one of its 8 requirements that one of the purposes in setting the water for the project is to unnaturally increase the waters of Lake Ontario as follows:

"(g). To hold back the natural excess outflow during the early summer months, in order to raise the ordinary levels of Lake Ontario; * * *" "(A. 380)".

Again, in Requirement (c), the plan is to retard natural outflow for the benefit of power operation, thereby raising Lake Ontario:

"(c). To maintain low flows during the winter period December 15 to March 31 in order that the difficulties of winter power operation may not be aggravated; * * *" "(A. 379)".

When requirements (c), (d) and (e) and (g) are read together, they add up to nothing more nor less than a retarding of the natural outflow from Lake Ontario from December 15 through the month of May each year, the very period when Petitioner needs every bit of the Lake's discharge since the latter part of May and June is the usual period of maximum high water in Lake Ontario.

Requirement (f), "(A. 380)", departs from nature's level in requiring only the "monthly mean" discharges to be within nature's limit. One unnatural high level combined with a storm would do millions of dollars worth of damage to Petitioner's members and it would be small comfort at the end of the month amid the resulting wreckage to read that officially the "monthly mean" discharge was within natural limits.

So it can readily be seen that the "applicable provisions and requirements * * *" putting into effect Method of Regulation No. 5 not only takes the properties that will be flooded by the nine to eleven inches indicated in Plate No. 9 by wrongfully referring to the levels of the past as natural levels, but in addition thereto will cause an additional elevation of Lake Ontario with Method of Regulation No. 5. In this connection, it should be noted that Lake Ontario front damage occurs when the level of Lake Ontario is higher than the elevation of 247 feet (R. 389) and that under Method of Regulation No. 5 the maximum lake level is planned to reach 249.10 feet (R. 394).

The "applicable provisions and requirements * * *" are artfully drawn. Nowhere do they contain any reference to "natural" levels "(A. 357)", except insofar as they are mentioned in Method of Regulation No. 5. While in Paragraph (a) "(A. 36)" a pious genuflection is made in the direction of the protection and indemnity required by

Article VIII of the Boundary Waters Treaty of 1909 for "all interests" which will be injured by the project, it is interesting to note that in Paragraph (i) "(A. 363)" the discharge of water from Lake Ontario is actually regulated to meet only the requirements of Paragraphs (b), (c) and (d) affording protection for others. While all the other interests get actual protection, the Petitioner gets only a pious phrase and the difficulty of litigation in which it is wrongfully handicapped from the start by provisions which say that the natural level of Lake Ontario is the artificially high level created by Gut Dam. The omission of the reference to natural levels was not inadvertent. Article VIII of the Boundary Waters Treaty of 1909, (36 Stat. Part 2, 2448) provides in part:

> "In cases involving the elevation of the natural level of water on either side of the line as a result of the construction and maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby."

It is respectfully submitted that in view of the testimony it can not be said that the elevation of the natural level of waters was not involved. The Court below said in its opinion:

> "There is a dispute as to whether the project works to be constructed under the license will or will not increase the water levels of Lake Ontario." (R. 433).

There is certainly no element of protection in any of the odious "applicable provisions and requirements * * *".

The history of the hearings of the International Joint Commission with law suits pending because no compensa-

tion was paid in the past for the flooding caused by Gut Dam, explains the subterfuge of using the term "past levels" instead of "natural levels."

What Congress intended by the Treaty is clearly indicated when we view the Boundary Waters Treaty of 1909 in the circumstances surrounding it and not in 1952. The experience of Congress in 1909 had been principally with the use of the Great Lakes for purposes of navigation. The construction of dams was to raise levels to provide canals and better channels, Gut Dam, in the year the Boundary Waters Treaty was passed, had been in existence in its final form for a period of about five years. This was the last and immediate experience which Congress had had with Canada as to dams and the raising of water levels.

The Act of Congress (approved June 18, 1902) (32 Stat. L., 392) entitled "An Act Allowing the Construction of a Dam Across the St. Lawrence River" provided:

> "That consent is hereby given for the construction of the portion of the aforesaid dam, which crosses or abuts upon the territory of the United States: Provided, That the type of the proposed dam and the plans of construction and operation thereof shall be such as will not, in the judgment of the Secretary of War, materially affect the water level of Lake Ontario or the Saint Lawrence River or cause any other injury to the interests of the United States or any citizen thereof: And provided further, That the work of construciton on United States territory shall not be commenced until plans and details of the work shall have been submitted to and approved by the Secretary of War."

Consent to this dam was given under the hand of Elihu Root, Secretary of War, on the 18th day of August, 1903 and provided:

> "1. That if, after said dam has been constructed, it is found that it materially affects the water levels of Lake Ontario or the Saint Lawrence River or causes any injury to the interests of the United States, the government of Canada shall make such changes there-

in, and provide such additional regulation works in connection therewith, as the Secretary of War may order."

This requirement was in addition to a further clause in that consent which required compensation.

Again, in October 1904, consent was given to an addition to Gut Dam on the condition that the addition was to be removable and the same requirement was demanded of Canada, that if the dam materially affected the water levels of the Lake, or caused any injury, it was to be changed and altered.

That experience shows that the requirement for protection in case of the raising of natural levels was not surplusage, but was an additional requirement in such cases.

The Commission knew this history intimately and knew that in order to raise the natural level they had to provide physical protection. It was with this in mind that it deliberately found that the artificial level with Gut Dam in the outlet was the natural level.

So far as the "applicable provisions and requirements * * *" providing indemnity is concerned, there is no remedy for the properties of Petitioner's members which are appropriated by the nine to eleven inches of flooding taken by Article 19 of the license. It seeks by subterfuge to give the licensee of the power project and Canada as a right obtained by a prescription by 50 year user the artificial level created by Gut Dam in the face of the fact that Canada at the time of the construction of Gut Dam agreed that no prescriptive right would be obtained by the user.

For additional flooding the remedies are inadequate. In its findings, the Respondent made no attempt to determine the financial ability of the licensee to provide either future protection or adequate indemnity for damage. The only finding as to the financial standing of this artificial entity created by the New York Power Authority Act is Finding No. 10 "(A. 203)":

"(10) The Applicant, Power Authority, has presented satisfactory evidence of its financial ability to

construct and operate the proposed Project No. 2000, including the testimony of an underwriting house that all of the necessary securities can be marked at reasonable costs."

Again in Finding No. 25 "(A. 206):"

(25) There is no evidence that public interest would be served by the requirement for further study by the Power Authority of the alleged rights and claims or owners of property bordering upon Lake Ontario as a prerequisite to the issuance of a license in this proceeding."

In the event that damage results to the Petitioner as a result of the construction or negligent operation by the Canadian entity, the existing laws of the United States will not reach such a defendant. Section 10 (c) of the Federal Power Act (16 USCA 791 (a)) specifically provided that the United States shall in no event be liable. The Power Authority Act of the State of New York does not permit a suit against New York. (Power Authority Act of New York, Chapter 772, Laws of New York 1931, as amended by Chapter 146, Laws of New York 1951).

If the Power Authority of the State of New York controls the water levels in accordance with Method of Regulation No. 5, contained in the "applicable provisions and requirements * * *" of Article 19 of the license, it will be controlling the water in accordance with a legal order and will no doubt contend that, accordingly, it is not liable. It may contend that the courts of the State of New York do not even have a right to review the order in question since it originated in an international tribunal. The International Joint Commission has no control over the monies of the Power Authority of the State of New York, inasmuch as the Power Authority of the State of New York was not even the applicant before the International Joint Commission. Assuming the Power Authority of the State of New York is liable for damages caused Petitioner by flooding, it has made no financial provision for paying

these claims. To the contrary, the Power Authority and the State of New York, took the precaution in Sec. 1010 of the Power Authority Act of providing that "* * * any pledge of revenues or other moneys or of a revenue producing contract or contracts * * *" shall create a lien against such properties "* * * valid and binding as against all parties having claims of any kind in tort, contract or otherwise * * *". Putting all its assets "in hock" prior to litigation with Petitioner as to claims belies any good faith on the part of the Power Authority. Respondent has given Petitioner a financial ghost for satisfaction of Petitioner's damages. It made no study or any estimate and has given no consideration to the cost of damages which may be assessed against it on account of the project (R. 392). The only source of money for more than five years is the proposed bond issue which did not take into account the likelihood of damage payments to Petitioner's members except to guard the proceeds against claims. A number of ordinary remedies available to judgment creditors would be difficult in respect to the Power Authority of the State of New York. For example, it is unlikely that a receiver would be appointed or that the project's structures could be sold under execution.

Thus, there is a taking of the property of Petitioner's members without just compensation in violation of the Fifth Amendment of the United States Constitution if the "applicable provisions and requirements * * *" of Article 19 are judicially approved. The amount of Petitioner's properties which will be flooded by the nine to eleven inches involved in the artificial Gut Dam level will have been given to the licensee and Canada, in view of the manner in which the "applicable provisions and requirements * * *" are drawn. Additional properties will be taken by additional flooding under Method of Regulation No. 5 and no adequate remedy is provided by the license for this taking.

CONCLUSION

Wherefore, Petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause directed to the United States Court of Appeals for the District of Columbia Circuit, and upon such review the judgment of said Court of Appeals for the District of Columbia Circuit be vacated, reversed, and set aside, and that this case be remanded to said Court with instructions to proceed further in accordance with the views of this Court.

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APPENDIX TO BRIEF

Section 10 (c) of the Federal Power Act (16 U.S.C.A. 791 (a)) provides in part as follows:

> "* * * Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor."

Boundary Waters Treaty of 1909, 36 Stat. part 2, 2448, provides in pertinent part of Article VIII;

> "In cases involving the elevation of the natural level of water on either side of the line as a result of the construction and maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby."

An Act of Congress (approved June 18, 1902) (32 Stat. L., 392) entitled "An Act of Congress Allowing the Construction of a Dam Across the St. Lawrence River" proprovided in part:

> "That consent is hereby given for the construction of the portion of the aforesaid dam, which crosses or abuts upon the territory of the United States: Provided, That the type of the proposed dam and the plan of construction and operation thereof shall be such as will not, in the judgment of the Secretary of War, materially affect the water level of Lake Ontario or the Saint Lawrence River or cause any other injury to the interests of the United States or any citizen therof: And provided further, That the work of construction on the United States territory shall not be commenced until plans and details of the work shall have been submitted to and approved by the Secretary of War."

The Power Authority Act of New York, Chapter 772, Laws of New York, 1931, as Amended by Chapter 146, Laws of New York, 1951, provides in pertinent part:

> "It is the intention hereof that any pledge of revenues or other moneys or of a revenue producing contract or contracts made by the authority shall be valid and binding from the time when the pledge is made; that the revenues or other moneys or proceeds of any contract or contracts so pledged and thereafter received by the authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act; and that the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the authority irrespective of whether such parties have notice thereof. Neither the resolution nor any other instrument by which a pledge is created need be recorded."

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IN THE

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OCTOBER TERM, 1953

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LAKE ONTARIO LAND DEVELOPMENT AND BEACH PROTECTION ASSOCIATION, INC., *Petitioner*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT BRIEF FOR THE RESPONDENT AND INTERVENORS IN OPPOSITION

OPINIONS BELOW

Opinions No. 255 (R. 192-219) and No. 256 (R. 220-227) of the Federal Power Commission, both adopted on July 10, 1953, and issued on July 15, 1953, have not been reported as yet. The opinion of the Court of Appeals (R. 422-434) has not been reported yet. See also *Matter of Power*

Authority of the State of New York, 9 F.P.C. 301 (R. 50-60).

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1954 (R. 436). A timely petition for rehearing en banc (R. 438-446) was denied after consideration by eight judges on February 18, 1954 (R. 447). The petition for a writ of certiorari was filed on May 19, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

This brief in opposition is being filed shortly after receipt of the petition in the hope that the petition for certiorari will be acted upon at this term of Court. Delay in construction postpones savings of over $2,500,000 per month to the electric consumers of the Northeast, where a market for low-cost hydroelectric power is ready and waiting. Comparable savings may be expected in Canada. If certiorari is denied before the Court's summer recess, it is believed that financing can be obtained and construction begun by July 1st. Otherwise, the whole project, including the construction of the St. Lawrence Seaway, may have to wait until the next construction season, in the spring of 1955. See R. 401-405, for Motion to Expedite below.

QUESTION PRESENTED

The only question presented by the petition (Pet. 2) is whether riparian property on Lake Ontario will be taken without just compensation in violation of the Fifth Amendment by reason of the issuance of a license by the Federal Power Commission to the Power Authority of the State of New York for the construction of a power project on the St. Lawrence River more than seventy miles down stream from the outlet of Lake Ontario.

No such question was raised below, although the petitioner did assert below that the remedies available to the riparian owners were inadequate on other grounds. Many

other constitutional and other contentions presented below by this petitioner, as well as by other parties who did not petition for certiorari, have been abandoned.

TREATY AND STATUTES INVOLVED

The pertinent provisions of the Boundary Waters Treaty (36 Stat. 2448), of the Federal Power Act (41 Stat. 1063, as amended, 16 U.S.C. 791-823), The St. Lawrence Seaway Development Corporation Act, (68 Stat. 92) and the New York Power Authority Act are all found in Appendix A, *infra*, pp. 23-27.

STATEMENT

Petitioner, an association of owners of real property located on the southern shore of Lake Ontario, seeks the review of a license granted by the Federal Power Commission to the Power Authority of the State of New York for the construction of a hydroelectric power project on the American side of the International Rapids section of the St. Lawrence River, designated in the records of the Federal Power Commission as "Project 2000." It bases its standing to challenge the validity of the license on the assertion that as the result of the construction of the project the level of Lake Ontario would be raised, thereby injuring the property of petitioner's members (R. 2).[1]

1. The Nature of the International Rapids Project.

The St. Lawrence River extends for some 1,200 miles from Lake Ontario to the Strait of Belle Isle. The initial reach of the river, extending for 68 miles from Lake Ontario to Chimney Point near Ogdensburg, New York (Thousand Islands section) descends only slightly and offers little obstacle to navigation.[2] The same holds true

[1] It should be noted at the outset that none of the owners of riparian lands in the River itself whose properties concededly will be flooded have challenged the Commission's order. The only attack comes from a representative of landowners on Lake Ontario who may not be affected at all.

[2] H. Rept. 1215, 83d Cong., 2d Sess., p. 30.

for the stretch of the river below Montreal. Between Chimney Point and Montreal, however, a distance of 114 miles, the river drops some 217 feet in a series of rapids.[3] Of this reach only the first 48 miles between Chimney Point and St. Regis, in which the St. Lawrence River forms the international boundary between the United States and Canada[4], are relevant to this litigation.[5] As the result of a concurrence of favorable natural circumstances, a drop of 92 feet[6] and an unusually steady flow of the river caused by the storage functions of the Great Lakes,[7] this International Rapids section is a "power engineer's dream";[8] it constitutes one of the last large low-cost sources of electric power in the northeastern United States (R. 199). At the same time the portion of the St. Lawrence River between Chimney Point and Montreal constitutes a bottleneck preventing ocean-going vessels from reaching the Great Lakes.[9]

The power project,[11] so far as relevant here, provides for a "controlled single stage project" consisting of a

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[3] H. Rept. 1215, 83d Cong., 2d Sess., pp. 30-31.

[4] R. 74, Exh. 106, par. 32, R. 378; H. Rept. 1215, 83d Cong., 2d Sess., pp. 30-31, see also Map opposite p. 32.

[5] The remainder of the [illegible] miles in which the river drops some 125 feet is located entirely in Canada and not subject to the Federal Power Commission license here under review.

[6] R. 74.

[7] R. 378. The ratio of maximum to minimum flow is only slightly more than two to one, in contrast with the 33:1 and 115:1 ratios of the Columbia River at Bonneville and of the Tennessee River at Florence, Alabama (Wilson Dam). R. 53, 195-196. See also S. Rept. 810, 80th Cong., 2d Sess., p. 91.

[8] S. Rept. 810, 80th Cong., 2d Sess., pp. 45-46.

[9] S. Rept. 441, 83d Cong., 1st Sess., p. 26. At present a 14-foot canal bypasses this section on the Canadian side; the controlling depth of the channel in the Great Lakes and the Thousand Islands section amounts to 25 feet; below Montreal it is more than 30 feet. *Ibid.*, Map facing p. 12.

[11] The technical aspects of this project go back to a January 3, 1941 Report which formed the engineering basis of an agreement between the United States and Canada for the construction of seaway and power installations by the two countries. This agreement, however, never obtained the required Congressional approval. Cf. S. Rept. 810, 80th Cong., 2d Sess., pp. 40-44; S. Rept. 441, 83d Cong., 1st Sess., pp. 6-10; H. Rept. 1215, 83d Cong., 2d Sess., p. 34.

control dam in the vicinity of Iroquois Point, a dam in the Long Sault Rapids at the head of Barnhart Island, and two power-houses (physically joined), one on either side of the international boundary at the foot of Barnhart Island.[12] The American half of the project will have a capacity of 1,100,000 horse power, which can produce 6.3 billion kilowatt hours of electrical energy per year on the American side of the river, and will benefit not only New York State but adjoining areas in other states. Similar benefits will accrue on the Canadian side of the river. The power project is a complementary part of the St. Lawrence Seaway plan designed to permit ocean-going vessels to enter the Great Lakes. In the International Rapids section the Seaway calls for a controlling channel depth of 27 feet and two relatively short[13] canals, one around the control dam at Iroquois Point, the other one by-passing the installations at Long Sault Dam and Barnhart Island Powerhouse.[14]

2. Proceedings Before The International Joint Commission.

Since the International Rapids section is a boundary river, the utilization of its power and its canalization require the agreement of the riparian sovereigns. In 1909 the United States and Great Britain,[15] "being equally desirous to prevent disputes regarding the use of boundary waters * * * and to make provision for the adjustment and settlement of all such questions as may hereafter arise,"[16] concluded a treaty relating to the boundary waters

[12] H. Rept. 1215, 83rd Cong., 2d Sess., p. 48.

[13] Since the dams turn a large portion of the St. Lawrence into deep lakes, only short canals around these installations are required. Accordingly, the construction of the Seaway is financially dependent upon the building of the power phases of the St. Lawrence Project. Cf. S. Rept. 441, 83d Cong., 1st Sess., pp. 12, 13.

[14] H. Rept. 1215, 83d Cong., 2d Sess., p. 31, and Map facing p. 32.

[15] Direct diplomatic relations between the United States and Canada had not been established at that time.

[16] See the Preamble of the Treaty, 36 Stat. 2448.

between the United States and Canada. This Treaty confers upon the International Joint Commission, created by the same agreement, the authority to approve "uses or obstructions or diversions * * * * of boundary waters on either side of the [boundary] line, affecting the natural level or flow of boundary waters on the other side of the line" (Art. III, *infra*, p. 23). It also confers upon the Commission the power, and in some circumstances the duty, to provide for the protection and indemnity of all interests adversely affected by the project (Art. VIII, *infra*, pp. 23-24).

On June 30, 1952, the United States and Canada agreed to submit to the International Joint Commission concurrent applications for the construction of power installations in the International Rapids section of the St. Lawrence River.[17] At that time it was left undetermined whether Canada would build the entire Seaway on its side of the St. Lawrence River or whether the United States would build the canals in the International Rapids section.

Complementary applications filed with the International Joint Commission on June 30, 1952[18] were approved by the International Joint Commission on October 29, 1952 (Docket No. 68) (R. 357-365). The Commission's Order of Approval called for the construction, maintenance, and operation of the above-described power installations on the Canadian side by the Hydro-Electric Power Commission of Ontario (R. 358-359); on the United States side by an entity to be designated by the United States Government instead of by the United States itself (R. 359).

Paragraph (a) of the Order provides that all interests on either side of the boundary which would be injured by the construction, maintenance, or operation of the project should "be given suitable and adequate protection and indemnity in accordance with the laws of Canada or the Constitution and laws in the United States, respectively,

[17] R. 68-72, S. Rep. 441, 83d Cong., 1st Sess., pp. 45-47.
[18] R. 73-82, S. Rept. 441, 83d Cong., 1st Sess., pp. 9, 40-43, 47-51.

and in accordance with the requirements of Article VIII of the Treaty" (R. 360).

In connection with regulation of water levels, the Order contained detailed provisions. It established a Board of Control charged with the supervision of water levels, the regulation of the discharge of water from Lake Ontario and the flow of water through the International Rapids Section (R. 362). In performing these functions, the Board must meet the requirements of paragraphs b-d of the Order of Approval (R. 363), *i.e.* give preference to domestic and sanitary uses of the water (par. b); safeguard the rights of the lower riparian power interest (par. c); and protect "so far as possible the rights of all interest affected by the levels * * * of Lake Ontario" (par. d) (R. 360). The method of regulating river levels must take into account the needs of navigation as well as power, and assure a depth of water adequate for traffic through the seaway which Congress has just authorized, see *infra*, p. 11.

To the extent that there then should be a prejudicial change of those levels these rights were subject to the compensation provisions of paragraph (a) of the order (R. 360). The Order assumed that these goals could be obtained by following Method of Regulation No. 5, prepared by the Department of Transport of Canada in 1940 (R. 363); it provided, however, for the modification of this method of regulation, if it should appear necessary (R. 363-364, 399). In this connection it may be pointed out that under the final paragraph of the Order the International Commission expressly retained jurisdiction over the subject matter (R. 365), and is now reconsidering the method of regulating the level of Lake Ontario. See *infra*, p. 12.

3. Proceedings Before the Federal Power Commission.

On September 11, 1952, the Power Authority of the State of New York filed an amendment to an earlier application [No. 2000] for a license to construct a power project in the International Rapids area (R. 64). The motion of

petitioner herein for leave to intervene, based on the claim that the construction of the project would raise the water levels of Lake Ontario and subject its members' properties to flooding (R. 92-94), was granted on November 13, 1952 (R. 99).

Petitioner took the following positions: (a) that the project should be licensed only on condition that the water level on Lake Ontario be maintained at or below 247.38 feet at all times; (b) that further studies be made to determine (1) the natural level of Lake Ontario in view of the removal of the Gut dam in the International Rapids ordered by the International Joint Commission, and (2) the additional costs of the project caused by the injuries to petitioner's property; and (c) that the license be denied (R. 114-115).

In order to understand petitioner's contention it is well to have in mind the physical arrangement of the project. *Cf.* H. Rept. 1215, 83rd Cong., 2nd Sess., Map facing p. 32. It consists of three main facilities: the Long Sault, Barnhart Island and Iroquois Control Dams. The Long Sault Dam extends between the American shore and Barnhart Island. The Barnhart Island Dam will extend from that Island to the Canadian shore. Turbines, generators and associated facilities will be located on the Barnhart Island Dam. The Long Sault and Barnhart Island Dams will create a pool at a level initially of 238 feet, which may be increased to 242 feet with approval of the International Joint Commission after a trial period (R. 364). They are located approximately 103 miles from Lake Ontario. They are to be operated on a run of the river basis (R. 39) and there is no evidence that they will have any effect on the level of Lake Ontario.

Upstream from these dams at a distance of 78 miles from Lake Ontario will be located the Iroquois Control Dam. This dam will serve to regulate water levels on Lake Ontario and in downstream sections of the St. Lawrence River. This dam, as well as the rest of the project, will

be operated under instructions of the International Joint Commission, through the International St. Lawrence River Board of Control, a subordinate agency created by it.

In the hearings before the Presiding Examiner (trial examiner) petitioner did not introduce any affirmative evidence to support its petition but limited itself to the cross-examination of two of the Power Authority's witnesses (R. 122, 391-399).

This evidence, which is reproduced in its entirety at R. 391-399, did not show that the effect of this control of the Iroquois Dam by itself would jeopardize petitioner's interests.

With respect to Method of Regulation No. 5, which the International Joint Commission originally approved, but which it is now reconsidering, and upon which petitioner focuses its main attack, the evidence disclosed that this method of regulation would actually lower the maximum level of Lake Ontario from 249.27 to 249.10 (R. 394, 398).

The Presiding Examiner found that there was no evidence to the effect that the maintenance of levels higher than 247.38 feet would by itself cause damage to property; that there might not be any injury at all caused by the project; and that in any event, if land should be flooded, the owners of such property would be entitled to compensation and that their remedy was with the courts (R. 122).

The Federal Power Commission upheld the decision reached by the Presiding Examiner. In its Opinion No. 255 issued on July 15, 1953 (R. 192-217)[19] it granted a license to the Power Authority of the State of New York.[20]

Art. 19 of the license issued by the Commission provided expressly that "in the design, construction, maintenance

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[19] Opinion No. 256 (R. 220), issued the same day, rejected the application filed by Public Power and Water Corporation, a competing applicant.

[20] The license was accepted by the Power Authority of the State of New York on November 3, 1953. On November 4, 1953 the President of the United States in Executive Order No. 10,500 (18 F.R. 7005) declared the Power Authority to be the designee of the U. S. Government for the construction of the power project. H. Rept. 1215, 83d Cong., 2d Sess., p. 32.

and operation of the project * * * the Licensee shall comply with all applicable provisions and requirements of the Order of Approval" of the International Joint Commission described *supra*, pp. 6-7 (R. 214). The license was also subject to all the terms and conditions of the Federal Power Act, incorporated by reference, including Section 10(c) of the Federal Power Act, which provides that the licensee is liable for all damages to the property of others caused by the construction, maintenance, or operation of the licensed project.[21]

Pursuant to Section 313(a) of the Federal Power Act, petitioner applied to the Federal Power Commission for rehearing and at the same time moved for leave to file additional evidence (R. 249). The petition and motion were denied (R. 259); the latter on the ground that petitioner had not shown why it could not have tendered its evidence while the hearings were in process. The Commission pointed out that the proper forum to hear petitioner's objections to the method of regulating the level of Lake Ontario was not the Federal Power Commission but the International Joint Commission, and found that there were no facts in the record showing that petitioner is an aggrieved party (R. 260).

4. Proceedings in the Court of Appeals.

Petitioner thereupon, pursuant to Section 313(b) of the Federal Power Act, filed its petition for review in the United States Court of Appeals for the District of Columbia Circuit (R. 1-18).[22] The Court of Appeals affirmed the decision of the Federal Power Commission,[23] and dis-

[21] R. 207; see also Art. 18 of the License (R. 214).

[22] Petitions for review were also filed by Public Power and Water Corporation, a competing applicant for the license, and Central Pennsylvania Coal Producers' Association, an intervenor. Neither of them, however, filed a petition for certiorari.

[23] A motion for leave to adduce additional evidence, filed pursuant to Section 313(b) of the Federal Power Act (R. 406) was denied by the Court of Appeals on December 29, 1953 (R. 421).

posed of this petitioner's contentions in a single paragraph[24] as follows (R. 433-434):

> Petitioner Lake Ontario Land Development and Beach Protection Association, Inc., is an association composed of homeowners whose properties border on Lake Ontario. They say that the construction of the Iroquois Dam will raise the level of the water in Lake Ontario to such a point that in stormy weather their properties will be damaged. There is a dispute as to whether the project works to be constructed under the license will or will not increase the water levels in Lake Ontario. However that may be, the matter was submitted to the International Joint Commission and was determined by it, and, moreover, a further study of the matter is under way in a pending proceeding before that Commission. In approving the international aspects of the project the Joint Commission required that all interests injured be given "suitable and adequate protection and indemnity in accordance with the laws in Canada or the Constitution and laws in the United States respectively." Moreover Section 10(c) of the Federal Power Act provides that each licensee shall be liable for all damages occasioned to the property of others.

5. Congressional Authorization of U. S. Participation in the Construction of the St. Lawrence Seaway and the Reconsideration of Method of Regulation No. 5.

On May 13, 1954, the President approved the St. Lawrence Seaway Development Corporation Act. Pub. L. 358, 68 Stat. 92.[25] The functions of the corporation, as defined in Section 3 of the Act (*infra*, pp. 25-26), are, basically, to construct those navigation features of the 1941 Report (*supra*, p. 4, fn. 11) which are located in United States territory, *i.e.*, the construction of canals by-passing the dams to be built in connection with the power project,[26] and the

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[24] The great bulk of the opinion below rejected certain attacks upon the legality of the license which petitioner does not raise here. R. 434-433.

[25] For the background of this legislation see S. Rept. 441, 83d Cong., 1st Sess., p. 10; H. Rept. 1215, 83d Cong., 2d Sess., pp. 34-35, 36-37.

[26] H. Rept. 1215, 83d Cong., 2d Sess., pp. 31, 48-49.

deepening of the channel in the Thousand Islands section of the St. Lawrence River. The close interrelation between the Seaway and power plans appears from Section 3(a)(2), which provides that the corporation shall not proceed with construction unless and until it has received satisfactory assurances that

> the State of New York, or an entity duly designated by it, or other licensee of the Federal Power Commission, in conjunction with an appropriate agency in Canada, as nearly as possible concurrently with the navigation works herein authorized, will construct and complete the dams and power works approved by the International Joint Commission in its order of October 29, 1952 (docket 68) *or any amendment or modification thereof.*[27] [Italics supplied]

Section 3 is significant for another reason highly pertinent to these proceedings. It will be noted that it refers to the Order of the International Joint Commission of October 29, 1952 (docket 68) "or any amendment or modification thereof." The italicized clause was added on the floor of the House of Representatives, at the instance of two Representatives from the region in which petitioner's members are located, who pointed out that, as the result of further studies, the International Joint Commission was considering the modification of Method of Regulation No. 5[28] (100 Cong. Rec. (Daily Ed. May 6, 1954) 5802-5803).

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[27] Section 3(b) directs the corporation to make the necessary arrangements to assure the coordination of its activities with those of the St. Lawrence Seaway Authority of Canada and with the entity authorized to construct and operate the power facilities.

[28] Cf. the following excerpt from a press release of the International Joint Commission dated January 28, 1954, read into the Congressional Record (for the full text of the press release see Appendix B, *infra*, pp. 27-29):

> "* * * To the extent that the method of operation known as Method No. 5, which was tentatively approved in the Order, does not fully satisfy all of those requirements, it will be modified by the Commission as provided for in the Commission's Order of October 29, 1952 which makes the method of regulation subject to such further modification as the Commission deems necessary.
>
> The investigation now being conducted by the International Lake Ontario Board of Engineers has thus far shown that in respect to some of

ARGUMENT

Petitioner attacks the grant of a license for the St. Lawrence power project to the New York Power Authority on the ground that construction of the project would raise Lake Ontario to levels which would damage the riparian beach properties owned by petitioner's members, and that the license will therefore take the property of petitioner's members without just compensation.

We shall show that these arguments are completely without merit for the following reasons, *inter alia*:

(1) Petitioner's assumption that its members' lands will be flooded as a result of the project has no support whatsoever in the evidence and is inconsistent with the Commission's findings.

(2) Even assuming damage to the riparian lands, this would be far outweighed by the many other interests to be benefited by the power project, with the result that such damage in and of itself would not be sufficient reason for invalidating the Federal Power Commission's license.

(3) Again assuming damage to the riparian lands, the Federal Power Act, the Power Commission's order, the Boundary Waters Treaty of 1909, creating the International Joint Commission, the order of the International Joint Commission approving the St. Lawrence Project, the United States Constitution, and the Constitution and statutes of the State of New York, all guarantee just compensation for any property losses caused by the project.

(4) The level or flow of international streams is subject to regulation by the International Joint Commission, the

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the datum points and also in relation to the calculation of flow, there are indications that the criteria used in the development of Method of Regulation No. 5 require modification. These are matters which the two Chairmen announced the Commission will correct as soon as the International Lake Ontario Board of Engineers has completed its investigations and given the Commission the required basis for constructive action." [100 Cong. Rec. (Daily Ed. May 6, 1954) 5803.]

action of which is not reviewable in American courts, rather than by the Federal Power Commission. The method of regulation of the level or flow of the water, to which this petitioner is objecting, and which was prescribed by the International Joint Commission, is now being reconsidered by that Commission, in large part at the instance of petitioner's members.

Furthermore, since the decision below, Congress has enacted the St. Lawrence Seaway Development Corporation Act, Public Law 358, approved May 13, 1954, 68 Stat. 92, which authorizes the United States to participate in the construction of the St. Lawrence Seaway. As we have shown, that statute (*supra*, p. 12) on its face contains manifestation of congressional approval of the license to New York to construct the power project. And the amendment discussed at page 12 indicates that Congress considered petitioner's interests adequately protected by the International Joint Commission's reconsideration of Method of Regulation No. 5.[29]

Hence, in evaluating this petition it must be realized that the administrative action here involved has in substance received Congressional approval and that petitioner, in effect, seeks to block a Congressional plan for the development of the Great Lakes region.

1. Petitioner's Assumption That It Will Be Injured as the Result of the Project Is Not Supported By Any Findings Nor By Any Evidence.

The petitioner presents to this Court as if it were a fact that the project will raise the level of Lake Ontario nine to eleven inches higher than its natural state, thereby inflicting damage running into the millions of dollars upon petitioner's members. (Pet. 7) There are no findings supporting this keystone of petitioner's case, nor is there any evidence to this effect.

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[29] Cf. the statements made by Representatives Keating and Ostertag on the floor of the House (100 Cong. Rec. (Daily Ed. May 6, 1954) 5802-5803) with their testimony before the International Joint Commission (R. 409-410).

The Presiding Examiner found that there was "no affirmative showing of any damage * * *. * * * This limitation [of the operating level to 238 feet] may or may not render impossible the damages suggested by the Interveners as certain to result from Project construction." (R. 122). The Federal Power Commission in its denial of petitioner's petition for rehearing found that there "are no facts in the record and no allegations of facts in the petition for rehearing which would show that the petitioner herein is an aggrieved party * * *" (R. 260). In other words, the Commission found that the project would not injure petitioner's property. Under Section 313(b) of the Federal Power Act this finding of fact is conclusive if supported by substantial evidence.

The Court of Appeals found that there "is a dispute as to whether the project works to be constructed under the license will or will not increase the water levels in Lake Ontario" (R. 433); it did not set aside the finding of the Federal Power Commission.

Petitioner's entire argument is based on the assumption that this Court will reexamine this question of fact, three times decided adversely to it. Its argument is based to a large extent on matters which never formed a part of the record before the Federal Power Commission, but were contained in petitioner's motion before the Court of Appeals to adduce additional evidence (R. 406-420) which was denied (R. 421).

Although it may be assumed that there are lake levels at which the property of petitioner's members will be flooded,[30] petitioner has not shown that such flooding would be caused by the power project. A mere reading of the only testimony in the record before the Federal Power Commission remotely bearing upon this problem, that of Messrs. Burton and Leerburger (R. 391-399), will show not only that it does not support petitioner's contention, but indicates that

[30] The figure of 247 feet referred to at p. 4 of the Petition is based merely upon a statement of petitioner's counsel.

the water levels will be lower. For power purposes it is necessary to maintain a level between the power dams and the Iroquois dam of from 238 to 242 feet, and the evidence indicated that the only difference between the level at Iroquois dam and at Lake Ontario would be from two to three feet (R. 394). Thus the levels required by the power project would not cause Lake Ontario levels to reach 247 feet.

Petitioner's attack, hence, is directed against Method of Regulation No. 5, designed to control the levels of Lake Ontario so as "to keep the fluctuations of the levels of Lake Ontario within those which would have resulted in the past" (R. 379) and to "most nearly satisfy the conditions necessary to protect all interests involved" (R. 380). The evidence, however, showed that the highest level obtainable under Method of Regulation No. 5 (249.10 feet) would be less than the maximum lake level which has occurred in nature, *viz.*, 249.27 feet (R. 393-394, 398). Petitioner, of course, is injured by Method of Regulation No. 5 only if it provides for floodings in excess of those which would occur in nature.

Petitioner, consequently, seeks to establish that the 249.27 level is not the natural level of Lake Ontario but that it has been brought about artificially by the Gut Dam built in 1903,[31] the removal of which was directed in the same Order of the International Joint Commission which petitioner is here attacking (R. 359, 365). Although petitioner did not submit to the Federal Power Commission any evidence tending to show that Gut Dam had raised the level of Lake Ontario (R. 394-395), it claims here that its Exhibit at R. 417A[32] establishes that as the result of Gut Dam the lake level was raised by 9 to 11 inches as the result of

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[31] The Gut Dam was a short low dam between two islands in the St. Lawrence River but not all the way across. (See H. Rept. 1215, 83d Cong., 2d Sess., second Map facing p. 92). Its purpose was to "improve the navigation of the regular channel." H. Rept. 1888, 57th Cong., 1st Sess.

[32] This exhibit was attached to its motion in the Court of Appeals to adduce additional evidence (R. 406) which was denied (R. 421) as we have pointed out above (p. 10, fn. 23; 15).

Gut Dam. Actually, petitioner's graph does not have this effect at all. All it shows is the relation between the water level and the rate of discharge, and indicates that subsequent to the construction of Gut Dam a somewhat higher water level corresponds to a given rate of discharge. The graph, however, is inconclusive because it does not show to what extent Gut Dam and the channel improvements connected with it increased the speed of the discharge, thus lowering the lake level. Indeed, studies have shown that the highest monthly levels on Lake Ontario were reached prior to 1903 before Gut Dam was built rather than after.[33] Nor can any inference be drawn from the circumstance that the level of Lake Ontario was lower in 1953, *i.e.*, after the removal of Gut Dam, than it had been in 1951 and 1952 (R. 407). The high lake levels in the latter two years were caused by abnormally heavy rains in the Great Lakes area, while precipitation was swinging back to normal in 1953 (100 Cong. Rec. (Daily Ed., Jan. 20, 1954) p. 526).

What petitioner is really seeking is a guarantee by the New York Power Authority of lake levels so abnormally low as to prevent all flooding resulting from natural cyclic variations. It has not been shown that any flooding which would not otherwise occur would be caused by the power project.[34]

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[33] St. Lawrence Waterway Project, Regulation of Outflows and Levels of Lake Ontario, Method No. 5, prepared by Special Projects Branch, Department of Transport, Ottawa, Ontario, March 1952, pp. 12-15. This report, of which judicial notice may be taken, was submitted to, and considered by the Court below. It would have been introduced in evidence before the Federal Power Commission had petitioner offered any pertinent evidence there.

[34] The same considerations apply to petitioner's assertions about the extent of its damages. It did not submit any pertinent evidence on this issue to the Federal Power Commission (R. 391-399). The assertion that "the worth of the properties thus taken runs into millions of dollars" (Pet. 7) refers not to the record before the Federal Power Commission but to an *ex parte* affidavit (R. 418-490) attached to its motion in the Court of Appeals to adduce additional evidence. See *supra*, p. 10, fn. 23; 15.

2. Any Damage to Petitioner's Beach Property Would Be Far Outweighed by Benefits to the Public Generally.

However, even if we assume for the sake of argument that as the result of the project here under review petitioner's interests are subject to greater jeopardy than before, this still would not require the denial of the license. Every project of this sort requires to some extent a balancing of the several conflicting interests. Lands along the St. Lawrence River undoubtedly will be flooded and paid for, cf. p. 3, fn. 1. Here we have some 1,500 owners of waterfront property along Lake Ontario desiring the regulation of the river at a low level. The port of Toronto on the same lake, however, needs high water; the high rate of discharge in spring desired by petitioner (Pet. 8) might cause harbor damage at Montreal and other points downstream; it might also jeopardize the power project here involved for lack of water during the summer months. The importance of the electric power itself hardly can be overstated, in view of the power shortage in the area to be served by it. R. 206, 286, 401-405.[35]

Moreover, the St. Lawrence Seaway, which Congress has regarded as vital for our national defense,[36] cannot be built without this power project (*supra*, p. 12). In these circumstances the Commission reasonably could have concluded that any possible injury to the relatively few riparian landowners represented by petitioner was far outweighed by the benefit to the power users in the northeastern area, not to mention the inhabitants of the entire Great Lakes region. Indeed no sensible person could have concluded otherwise. And this is particularly so when petitioner, as a matter of law, would receive compensation for any damage caused by the project.

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[35] See also S. Rept. 441, 83d Cong., 1st Sess., p. 26, pointing to the urgency of the project, and the reference to it by the Court of Appeals (R. 434).

[36] H. Rept. 1215, 83d Cong., 2d Sess., pp. 38-41, 93-95, and see the Title of the St. Lawrence Seaway Development Corporation Act, *infra*, pp. 24-26.

3. Petitioner Is Clearly Entitled to Compensation If as the Result of the Instant Project Its Property Should Be Subject to Additional Injury.

The construction of a power dam frequently requires the taking of or injury to riparian property. The Federal Power Act accordingly confers eminent domain powers upon the licensee of a project (Section 21, *infra*, p. 24), which, of course, means that any damage must be paid for. The Power Authority of the State of New York has similar powers under the state law (New York Power Authority Act, Section 1007).[37] Moreover, as we have pointed out above, Section 10(e) (*infra*, p. 24) of the Federal Power Act, incorporated into the license, specifically makes the licensee liable for damages caused by the construction, maintenance, and operation of a project.[38] Article VIII of the Boundary Waters Treaty *infra*, pp. 23-24, and the Order of Approval of the International Joint Commission provide for similar remedies.

Petitioner claims that it is not properly protected under the Order of Approval because paragraph (i), setting forth the considerations for the regulation of the lake level refers only to paragraphs (b), (c), and (d), and not to paragraph (a) providing for the adequate protection and indemnity of persons injured by reason of the works (Pet. 9).

As we have pointed out above (p. 7), paragraph (d) (R. 360) is carefully phrased so as to protect "the rights of all interests affected * * * by the levels of Lake Ontario * * *". It expressly provides that

> any change in levels resulting from the works which injuriously affects such rights shall be subject to the requirements of *paragraph (a) relating to protection and indemnification.* [Italics supplied.]

Petitioner further claims that its remedies, if any, would be futile on account of difficulties of proof and because

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[37] Section 1007(7) expressly authorizes the Power Authority to utilize the procedure of Section 21 of the Federal Power Act, see *infra*, pp. 26-27.

[38] Cf. *Henry Ford and Son* v. *Little Falls Co.*, 280 U.S. 369, only recently referred to in *Federal Power Comm.* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 254.

judgments against the Power Authority could not be satisfied. The circumstance that it would not be easy for petitioner to show that any injury it would suffer in the future was caused by the licensee, and not by other sources, cannot of course be a reason to deny the license. If this were the law the more speculative the objections to a license, the less it could be granted. Just as no way has been discovered of relieving a defendant from the necessity of defending a law suit even if groundless,[39] no method has been elaborated as yet to alleviate a plaintiff's burden of proving a difficult case.

No merit attaches to petitioner's allegation that the Power Authority of the State of New York would be judgment proof[40] (Pet., p. 13), or to its assumption that the Authority would be too weak financially to pay for damages caused by it. Section 1010 of the New York Power Authority Act (*infra*, p. 27) does not mean that petitioner's claims, if any, would be subordinate to the lien of the revenue bonds. The pledge of the revenue to the bondholders constitutes a pledge of the net income after payment of expenses.[41] The argument that the Power Authority will not have any funds available to pay petitioner before it starts its operations ignores the facts that no damage can ensue before the dams are completed and that profitable operation will start immediately thereafter.

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[39] *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 51-52.

[40] The Power Authority of the State of New York does not enjoy sovereign immunity from suit. N. Y. Power Authority Act, Sec. 1002, *infra*, p. 26.

[41] And see *Guardian Trust Co.* v. *Keith*, 69 F. 2d 477 (C.A. 8), certiorari denied, 292 U.S. 652, to the effect that the constitutional obligation to pay just compensation for property flooded by a drainage district had priority over bonds supported by a pledge of all the property and revenues of the district.

4. The International Joint Commission has Jurisdiction to Regulate Water Levels and it is Presently Reconsidering Method of Regulation No. 5.

Up to now the legal discussion has proceeded upon the double assumption that the Federal Power Commission has issued the Method of Regulation No. 5 and that this method is still in effect, and we have shown that petitioner could not succeed even if those suppositions were true. Actually, however, neither of them is correct.

Method of Regulation No. 5 was not adopted by the Federal Power Commission but by the International Joint Commission. It was incorporated into the Federal Power Commission license (Art. 19, R. 214) by virtue of Article III of the Boundary Waters Treaty (*infra*, p. 23). In these circumstances it appears doubtful whether the review provisions of the Federal Power Act (Section 313(b)) apply to Method of Regulation No. 5, a determination of an international tribunal. Judicial review is frequently limited where the subject matter of the dispute touches upon international affairs. See, *e.g.*, *Chicago & Southern Air Lines* v. *Waterman SS Corp.*, 333 U.S. 103. And in any event our courts lack jurisdiction to review the decision of international tribunals. *Hirota* v. *MacArthur*, 338 U.S. 197, 198; *Z. & F. Assets Corp.* v. *Hull*, 311 U.S. 470.

Furthermore, the International Joint Commission is now reconsidering Method of Regulation No. 5, in part because of the very objections made by petitioner here.

The familiar principle that courts will not review incomplete administrative action would seem to apply *a fortiori* to petitioner's attempt to have this court overturn the Federal Power Commission order when this subject is presently under consideration by a different commission which has primary and authoritative jurisdiction over it.

CONCLUSION

Almost all of the questions to which petitioner has addressed its brief involve unique facts. Not only is there no conflict of decisions, but petitioner has been unable to cite a single case to support its contentions. Petitioner's standing to object to this important public improvement, as the representative of landowners who will be compensated if damaged by the project, is highly questionable. There is clearly no substance to any of the reasons advanced by petitioner for the grant of certiorari. The petition should be denied.

Respectfully submitted,

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MURRAY PRESTON

May, 1954

APPENDIX A.

1. The Boundary Waters Treaty of 1909 (36 Stat. 2448) provides in pertinent part:

ARTICLE III.

It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions, or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

* * * * *

ARTICLE VIII.

The International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rules or principles which are adopted by the High Contracting Parties for this purpose:

* * * * *

The Commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provision, approved by the Commission, be made for the protection and indemnity against injury of any interests on either side of the boundary.

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below

the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

* * * * *

2. The Federal Power Act (41 Stat. 1063, as amended, 16 U.S.C. 791-823) provides in pertinent part:

SEC. 10. All licenses issued under this Part shall be on the following conditions:

* * * * *

(c) * * * Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

* * * * *

SEC. 21. That when any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. * * *

3. The St. Lawrence Seaway Development Corporation Act (68 Stat. 92)

Providing for creation of the Saint Lawrence Seaway Development Corporation to construct parts of the Saint Lawrence Seaway in United States territory *in the interest of national security;* authorizing the Corporation to consummate certain arrangements with the Saint Law-

rence Seaway Authority of Canada relative to construction and operation of the seaway; empowering the Corporation to finance the United States share of the seaway cost on a self-liquidating basis; to establish cooperation with Canada in the control and operation of the Saint Lawrence Seaway; to authorize negotiations with Canada of an agreement on tolls; and for other purposes. [Italics supplied]

reads in pertinent part:

SEC. 3. (a) The Corporation is authorized and directed to construct, in United States Territory, deep-water navigation works substantially in accordance with the "Controlled single stage project, 238-242" (with a controlling depth of twenty-seven feet in channels and canals and locks at least eight hundred feet long, eighty feet wide and thirty feet over the sills), designated as "works solely for navigation" in the joint report dated January 3, 1941, of the Canadian Temporary Great Lakes-Saint Lawrence Basin Committee and the United States Saint Lawrence Advisory Committee, in the International Rapids section of the Saint Lawrence River together with necessary dredging in the Thousand Islands section; and to operate and maintain such works in coordination with the Saint Lawrence Seaway Authority of Canada, created by chapter 24 of the acts of the fifth session of the Twenty-first Parliament of Canada 15-16, George VI (assented to December 21, 1951): *Provided*, That the Corporation shall not proceed with the aforesaid construction unless and until—

(1) the Saint Lawrence Seaway Authority of Canada provides assurances satisfactory to the Corporation that it will complete the Canadian portions of the navigation works authorized by section 10, chapter 24 of the acts of the fifth session of the Twenty-first Parliament of Canada 15-16, George VI, 1951, as nearly as possible concurrently with the completion of the works authorized by this section;

(2) the Corporation has received assurances satisfactory to it that the State of New York, or an entity duly designated by it, or other licensee of the Federal Power Commission, in conjunction with an appropri-

ate agency in Canada, as nearly as possible concurrently with the navigation works herein authorized, will construct and complete the dams and power works approved by the International Joint Commission in its order of October 29, 1952 (docket 68) or any amendment or modification thereof.

(b) The Corporation shall make necessary arrangements to assure the coordination of its activities with those of the Saint Lawrence Seaway Authority of Canada and the entity designated by the State of New York, or other licensee of the Federal Power Commission, authorized to construct and operate the dams and power works authorized by the International Joint Commission in its order of October 29, 1952 (docket 68) or any amendment or modification thereof.

4. The New York Power Authority Act (New York Public Authorities Law Title I, Article 5) provides in pertinent part:

§ 1002. Power Authority of the State of New York

For the purpose of effectuating the policy declared in section one thousand one of this chapter and of improving the Niagara and Saint Lawrence rivers as instrumentalities of commerce and navigation and developing the hydroelectric power resources thereof, there is hereby created a corporate municipal instrumentality of the state to be known as "Power Authority of the State of New York," hereinafter in this title referred to as "the authority," which shall be a body corporate and politic, a political subdivision of the state, exercising governmental and public powers, perpetual in duration, capable of suing and being sued, and having a seal, and which shall have the powers and duties hereinafter enumerated, together with such others as may hereafter be conferred upon it by law.

It shall report annually to the governor and the legislature upon its operations and transactions.

§ 1007. Acquisition of Property

* * * * * * * * * *

7. The authority may, at its option, acquire such real property within the state of New York, under the general condemnation law or, in the event it is a licensee of the federal power commission it may acquire such real prop-

erty as is necessary for its purposes through the exercise of the right of eminent domain as provided in section twenty-one of the federal power act, as amended.

* * * * * * * * * *

§ 1010. BONDS OF THE AUTHORITY

* * * * * * * * * *

It is the intention hereof that any pledge of revenues or other moneys or of a revenue producing contract or contracts made by the authority shall be valid and binding from the time when the pledge is made; that the revenues or other moneys or proceeds of any contract or contracts so pledged and thereafter received by the authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act; and that the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the authority irrespective of whether such parties have notice thereof. Neither the resolution nor any other instrument by which a pledge is created need be recorded.

* * * * * * * * * *

APPENDIX B.

Press Release of the International Joint Commission Dated January 28, 1954.

At the conclusion of the meeting of the International Joint Commission in Boston yesterday, Senator A. O. Stanley and General A. G. L. McNaughton, the Chairmen of the United States and Canadian Sections respectively, gave a joint statement to the press.

They said that having regard to certain anxieties expressed by property owners along the shores of Lake Ontario, the Commission had carefully reviewed the terms of its Order of 29 October, 1952, by which it had approved the St. Lawrence River Power Project in the International Rapids Section of that river and is satisfied that the Order of Approval properly protects all interests in both countries which may be affected by the construction or operation of the power works. The two Chairmen went on to say that, not only were all interests properly protected by

the terms of the Order of Approval, but there is every reason to believe that the levels of Lake Ontario, which have been so high in recent years, can be so regulated by means of the works to be built in the St. Lawrence River as to actually benefit property owners and other interests along the shores of Lake Ontario and the St. Lawrence River, as well as the important interests of navigation and hydro-electric power. Channel excavations in the river, coupled with the construction of a dam with adjustable gates capable of discharging the full flood of the river in the event of an emergency, will make it possible for the first time to exercise a beneficial control over the levels of Lake Ontario.

It was explained that the Commission's Order of Approval stipulated that the power works must be so operated as not to conflict with or restrain uses of the St. Lawrence River for purposes which are given a higher priority than power purposes by the Boundary Waters Treaty of 1909; to safeguard the rights of power developments downstream from the works and also, as far as possible, the rights of everyone affected by the levels of Lake Ontario, the lower Niagara River and the St. Lawrence River upstream from Iroquois, Ontario. The Order provides also that if any interest affected by such levels is injured as a result of the works, full indemnity will be provided in accordance with the laws in Canada and the laws and Constitution in the United States.

It was stated that the power works, when completed, will be operated under the supervision of the International Joint Commission in such a way as to satisfy all of the requirements set forth in its Order of 29 October 1952. To the extent that the method of operation, known as Method No. 5, which was tentatively approved in the Order, does not fully satisfy all of those requirements, it will be modified by the Commission as provided for in the Commission's Order of October 29, 1952 which makes the method of regulation subject to such further modification as the Commission deems necessary.

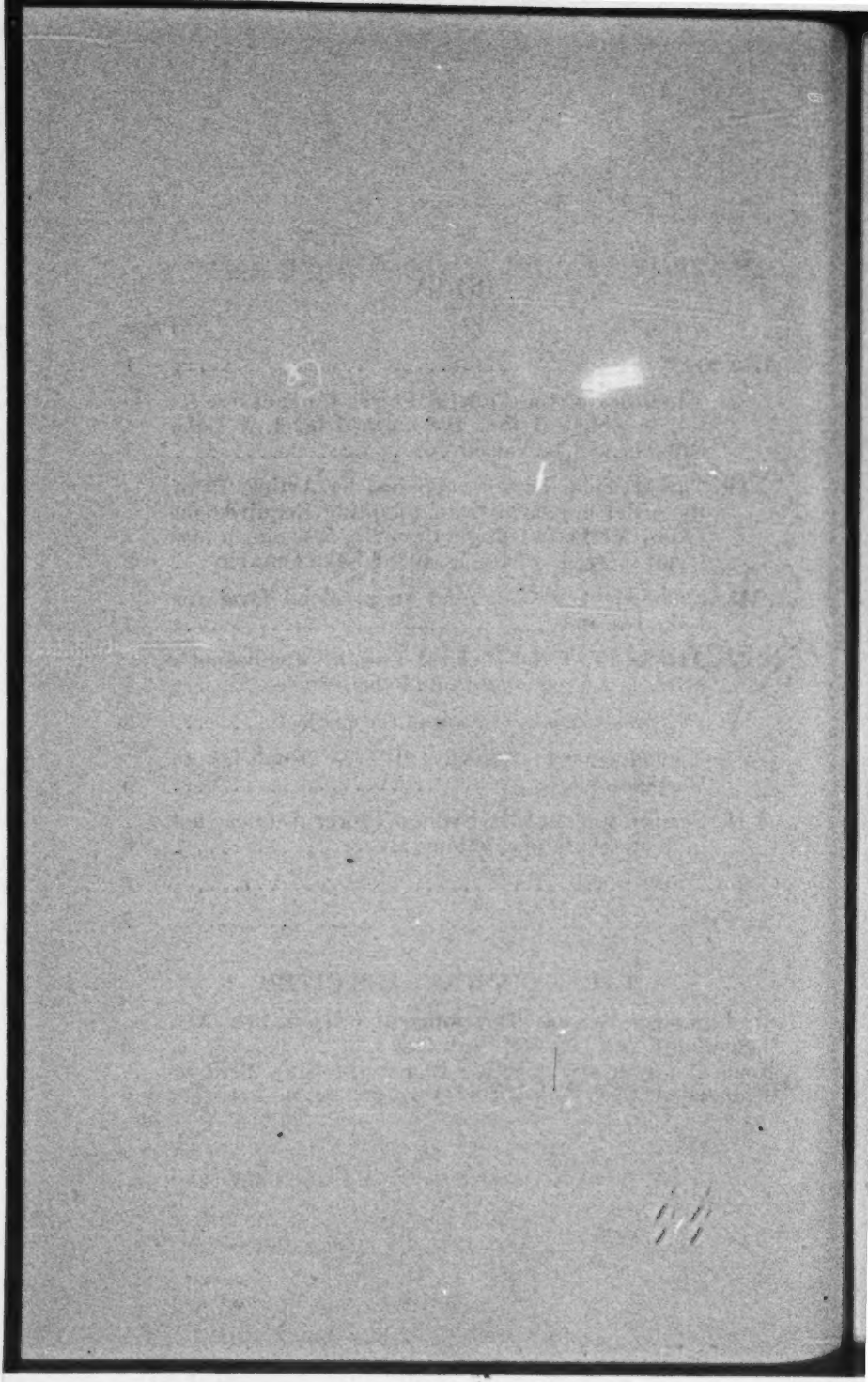
The investigation now being conducted by the International Lake Ontario Board of Engineers has thus far shown that in respect to some of the datum points and also in relation to the calculation of flow, there are indications that the criteria used in the development of Method of Regulation No. 5 require modification. These are matters which the two Chairmen announced the Commission will correct as soon as the International Lake Ontario Board of Engineers has completed its investigations and given the Commission the required basis for constructive action.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 772

LAKE ONTARIO LAND DEVELOPMENT AND BEACH PROTECTION ASSOCIATION, INC. (Also Known as Lake Ontario Land Owners and Beach Protective Association, Inc.), *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

and

GREAT LAKES-ST. LAWRENCE ASSOCIATION, POWER AUTHORITY OF THE STATE OF NEW YORK, *Intervenors.*

REPLY BRIEF

To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner is filing this reply brief in answer to Respondent's brief, dated May 27, 1954.

ARGUMENT

I.

The Order Of The Federal Power Commission Itself Established That The Natural Level of Lake Ontario Will Be Raised.

For the Respondent, therefore, to contend that there is no evidence before this Court that the project will raise the natural levels is contrary to the plain language of the

order itself. The Federal Power Commission adopted lock, stock and barrel Method of Regulation No. 5 by Article 19 of its order. It says in so many words that its object is to raise the natural level of Lake Ontario and to give Petitioner the fluctuations of levels which have existed in the past, meaning those caused by Gut Dam. Paragraphs (a) "(A. 379)", (c) "(A. 379)" and (g) "(A. 380)" of Method of Regulation No. 5.

It is one thing for Respondent to say that it is not responsible for Method of Regulation No. 5 and to admit that Method of Regulation No. 5 is unfair and unjust to Petitioner, as the last paragraph of the press release quoted in Appendix B, Respondent's brief (p. 29) implies, but quite another thing for the Respondent to claim that Method of Regulation No. 5, adopted and approved by it, does not call for the raising of lake levels.

II.

The Artificial Level Established By Article 19 Of The Order Appealed From, Adopting Requirement (a) of Method of Regulation No. 5, Means a Material Increase of the Levels of Lake Ontario.

(1) Respondent contends that Plate No. 9 is "inconclusive". This was not Petitioner's exhibit but was prepared by the Canadian engineers for the very purpose of showing the effect of Gut Dam on the levels of Lake Ontario and was so prepared before any dispute arose as to the effect of Gut Dam.

(2) In addition to Plate No. 9, Docket No. 68 referred to in Article 19 of the order appealed from, contains the following testimony of Gail A. Hathaway, United States Member of the International Lake Ontario Board of Control, given at Rochester, New York, on November 17, 1953, in respect to Plate No. 9. The following appears at page 49:

> "Mr. Forsyth: So far as the testimony before this Commission to this day is concerned, the record shows

that Gut Dam did raise the natural level of Lake Ontario. Is that the fact?

Mr. Hathaway: That is correct.

Mr. Forsyth: All right.

So when you talk about Method No. 5 is designed to give us no greater maximums than we had in the past, you mean no greater maximums with Gut Dam in; is that correct?

Mr. Hathaway: That was the premise of the Statement." Again, in the report of the United States Army Engineers, Great Lakes Division, U. S. Lake Survey, dated February 1952, a public document, under the title "Variations in Great Lakes Levels", at page 23, appears the following:

"Subject Gut Dam in the St. Lawrence River * * * * has caused an average ultimate rise in levels of that Lake in the order of six inches."

(3) The Department of External Affairs of the Canadian Government has admitted in its letter of October 25, 1951, addressed to the American Embassy at Ottawa, as appears by a summary of that note by the United States Department of State, dated February 13, 1952, that Gut Dam artificially raised the levels of Lake Ontario. That admission is in the following language:

"The net effect of all these works at periods of high water level is then stated to be as follows:

Effect of Gut Dam	plus 7¾	inches
Effect of Ogoki and Long Lac	plus 3	inches
Effect of Chicago Diversion	minus 2	inches
Net Effect	plus 8¾	inches."

III.

Respondent Has Adopted An Artificial Level For Lake Ontario.

Respondent at page 19 of its brief, admits that the protection given by Paragraph (a) of the order of approval of the International Joint Commission, adopted in Article 19 of the order appealed from, is deleted from the provisions of the order which controlled lake levels, namely, Paragraph (i) Respondent still contends however that the benefits of the protection of Paragraph (a) are contained in the last sentence of Paragraph (d). Respondent quotes at page 19 the last sentence of Paragraph (d) as follows:

"* * * any change in levels."

Petitioner urges that the quotation confirms its position. Protection is only given by the last sentence of Paragraph (d) above for any "change in levels" above the artificial levels created by Gut Dam. The property of Petitioner appropriated by the difference between natural levels and the artificial levels is admittedly taken without compensation.

IV.

Article 19 of the Federal Power Commission's Order Is A Fixed Condition of the License.

Respondent repeatedly asks this Court to deny the petition for certiorari on the grounds that the International Joint Commission is still studying Method of Regulation No. 5 and may in the future change it. In this connection Respondent quotes a press release of the International Joint Commission, dated January 28, 1954, and attaches the same as Appendix B to its brief. In this regard Petitioner desires to point out to the Court that the order of October 29, 1952 of the International Joint Commission is now the law of this case, as adopted by Article 19 of the order of the Federal Power Commission. In order to change

Method of Regulation No. 5, a majority vote of the Commission is required. Three of the Commission's members are Canadians and three are Americans. Method of Regulation No. 5, as it now stands, clearly gives to the Canadian interests down the river advantages which they did not have in nature. In view of this fact, it will be extremely difficult for the Canadian members to vote for a change. Petitioner does not feel it should be a charity patient of the Canadian members of the Commission so far as the appropriation of its property without compensation is concerned.

V.

Petitioner Does Not Oppose The Project.

Petitioner has no quarrel with the argument of Respondent as to the possible benefits of the power and seaway project. Petitioner does object, however, to being the "forgotten man". Regardless of which levels are adopted in the interests of the overall picture, Petitioner has a right to insist on compensation for its property taken by the establishment of an artificial level higher than the natural level, and for indemnity for any damage caused in addition thereto.

VI.

Amendment To Seaway Bill Is Beneficial To Respondent.

Respondent lays great stress (R. brief, page 12) on the amendment to the St. Lawrence Seaway Development Corporation Act, Public Laws 358, 68 Stat. 92, which, it is claimed, was procured at the instance of Petitioner. The purpose and effect of that amendment is to save this great project in the event this Court feels that the order appealed from should be remanded for such amendments as would adequately protect and indemnify this Petitioner.

VII.

Section 10(c) of the Federal Power Act Does Not Give Adequate Protection.

Respondent refers to Article 10(c) (R. brief, page 10) of the Federal Power Act as providing damages for this Petitioner by the license. The principal trouble with this provision is that the order finds the property taken by the artificial level of Gut Dam is not Petitioner's property. Clearly no damages are payable except for flooding in excess of the artificial level of Gut Dam under the order of the Federal Power Commission.

CONCLUSION

Wherefore, Petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause directed to the United States Court of Appeals for the District of Columbia Circuit, and upon such review the judgment of said Court of Appeals for the District of Columbia Circuit be vacated, reversed, and set aside, and that this case be remanded to said Court with instructions to proceed further in accordance with the views of this Court.

Respectfully submitted,

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APPENDIX

Summary of Note Dated February 27, 1952 From The Canadian Department of External Affairs To The American Embassy at Ottawa Concerning High Level of Water in Lake Ontario.

The Canadian note refers to the note of October 19, 1951 from the Ambassador of the United States concerning complaints from landowners along the southern shore of Lake Ontario that damage has been caused to land and property by erosion and inundation as a result of the high level of the lake, which is ascribed, in part, by those making the complaints, to the effect of the Gut Dam.

Reference is then made to the Canadian reply of October 25, 1951 concerning the investigation made by the Canadian officials concerned. It is stated that this investigation shows that, although the level of the lake has been unusually high on several occasions during the past five years or so, it has also been abnormally low on some occasions in recent years. The high water levels in recent years are, for the most part, due to natural causes, the result of greatly increased precipitation in the entire Great Lakes watershed, which appears to vary in irregular cycles, and the consequent increased run-off into the Great Lakes. Moreover, the maximum daily mean water level recorded in recent years (246.69 feet above sea level on July 30, 1947) was exceeded during 234 days between 1858, the earliest year on record, and 1900 (i.e. during the period before the Gut Dam was built), with a maximum recorded elevation of 247.38 feet above sea level on May 22, 1862.

With regard to the effects of the Gut Dam on the situation, the following excerpts from the report made as a result of the investigation are quoted:

> "*Location.* The Gut Dam is located in the St. Lawrence River about 7 miles below Prescott and extends across the channel between Galop Island and Adams Island.
>
> "*Purpose.* The Dam was built in order to: 'shut off a side or cross current in the Galop Rapids and thereby render that channel safer for the passage of vessels. A secondary object is to raise the water in the upper entrance of the Galop Canal.' "

"*Effect of Dam on Flow Distribution.* Prior to the construction of the Gut Dam 54.3% of the total flow of the River at times of mean flow passed north of Galop Island, 12,000 cubic feet per second of which passed through the channel between Galop and Adams Islands. At the present time 52% of the flow passes down the North channel.

"*Effect of Dam on Water Levels.* Closure of the Galop-Adams Island Channel has resulted in a raise in water level of 0.50 feet (6 inches) in the water level at mean stage at the upper entrance to the Galop Canal and 0.45 feet (5½ inches) at mean stage on Lake Ontario (Oswego, N. Y.).

"The maximum daily mean water level recorded at the upper entrance to the Galop Canal since the Dam was built was elevation 246.69 feet (July 30, 1947). This level was exceeded during 234 days between 1858, the earliest year of record, and 1900, with a maximum recorded elevation of 247.38 (May 22, 1862).

"The maximum monthly mean level recorded at the upper entrance to the Galop Canal since the Dam was built was elevation 246.34 (July 1947). This mean level was exceeded during 16 months during the period 1858 to 1900, with a maximum monthly mean of 246.84 in May 1862.

"During the period of low levels occurring in 1934, '35 and '36 the depth available for navigation in the St. Lawrence Canals was governed by the depth on the upper sill of Lock 24 and reached a minimum of 11.8 feet on November 26, 1934. If the Gut Dam had not been in place the depth of water on the upper sill of Lock 27 (the upper entrance lock of the Galop Canal) would have been the governing depth on the St. Lawrence Canals and would have fallen to a minimum of 11.7 feet on November 20, 1934. Of greater importance than the decrease in the available depth is the increase in the number of days during the low water period on which the full 14-foot depth would not have been available—from 386 occurrences under present conditions to 785 occurrences with the Gut Dam removed.

"*Effect of Dam on Currents.* At the present time certain vessels navigate upstream past Iroquois and

enter the Galop Canal at Lock 28. If the Gut Dam were removed the velocities at mean stage at the lower entrance to Lock 28 would be increased by approximately 5%. Whether this is a serious matter or not could only be determined by consultation with the pilots in charge of these vessels."

From these statements the Canadian note expresses the view that it is clear that the net effect of the Gut Dam on the level of Lake Ontario at mean stage is 0.45 feet (5½ inches). The effect of the Gut Dam is slightly greater at periods of high water level but the greatest effect, occurring in May 1951, was 7¾ inches. The raising of the level by the Dam has been in effect in periods of both high and low levels during the half century since the Dam was built. Moreover, the need for the Dam to increase the availability of a sufficient depth of water for navigation in the St. Lawrence River—a use of boundary waters accorded a high priority under the Boundary Waters Treaty of 1909—has been evident on many occasions, as noted in the report.

As the effect of other diversions on the level of Lake Ontario is involved, the following paragraphs from the Canadian report with respect to the net effect of these diversions and of the Gut Dam, are quoted:

"The quantity of water diverted from the Hudson Bay Drainage Area into the Great Lakes Basin via the Long Lac and Ogoki River diversions varies from time to time. To date it has been assumed that on the average the total amount added to the Great Lakes Drainage Basin will be 5,000 c.f.s. The effect of this additional water on the level of Lake Ontario at times of mean flow is 0.25 feet (3 inches)."

"The amount of water diverted from the Great Lakes Drainage Basin via the Chicago Drainage Canal is now regulated by a decree of the Supreme Court of the United States, dated April 21, 1930, and is limited to an annual average of 1,500 c.f.s. in addition to domestic pumpage. This latter amount can be taken at about 1,800 c.f.s. The effect of the total diversion of 3,300 c.f.s. on the water level of Lake Ontario at times of mean flow is 0.16 feet (2 inches)."

"The net effect of the Gut Dam, the Long Lac and Ogoki diversions and the Chicago diversion on the

water level of Lake Ontario at times of mean flow is as shown below:

Works	Amount of Diversion c.f.s.	Effect on W.L. of Lake Ontario
Gut Dam		+ 0.45 feet
Long Lac & Ogoki Diversions	5,000	+ 0.25 feet
Chicago Diversion	3,300	— 0.16 feet
		+ 0.54 feet (6½ inches)"

The net effect of all these works at periods of high water level is then stated to be as follows:

"Effect of Gut Dam	+ 7¾ in.
Effect of Ogoki and Long Lac (5,000 c.f.s.)	+ 3 in.
Effect of Chicago Diversion (3,200 c.f.s.)	— 2 in.
Net Effect	+ 8¾ in."

By way of recommendation, the Canadian note states that the report of the Canadian officials contains a statement that the construction of the St. Lawrence Seaway and Power Project in the International Section of the St. Lawrence River will provide for the regulation of outflow and level of Lake Ontario at the proposed dams and power-houses. This is considered to be the most effective way of dealing with the problem.

The Canadian note concludes with the following statement:

> "The additional suggestion that the question of the levels of the Great Lakes be referred to the International Joint Commission for study and recommendations will require further consideration by the Canadian Government and this will form the basis of another communication at an early date."